

Fair Work Commission  
Level 10, Terrace Tower, 80 William Street  
EAST SYDNEY NSW 2011  
Via email: [AMOD@fwc.gov.au](mailto:AMOD@fwc.gov.au)

19 March 2018

**Re: AM2014/239 Pastoral Award 2010**

## **BACKGROUND**

1. The President, Justice Ross, issued Directions on 9 February 2018 for interested parties to file written submissions regarding the operation of clauses 17.2(c)(ii) and 36 of the *Pastoral Award 2010* (**Pastoral Award**) and clauses 10.2(d) and 32.7 of the Exposure Draft for the Pastoral Award 2010 (**Exposure Draft**).
2. The following parties filed submissions:
  - 2.1. The Australian Workers' Union (**AWU**); and
  - 2.2. The National Farmers' Federation (**NFF**).
3. The AWU reply submissions are below.

## **REPLY SUBMISSIONS**

### **National Farmers' Federation**

4. The AWU notes that the NFF submission relies heavily on importing the five-hour threshold from clause 15.1(a) of the *Pastoral Award 2010* (**Pastoral Award**) into the overtime meal allowance clauses.

5. As we have noted previously, such a reliance is misplaced for three reasons:
  - 5.1. Clause 15.1(a) deals specifically and exclusively with an employee's *first meal break during ordinary working hours*;
  - 5.2. Clause 15.1(a) deals with meal *breaks*, not meal *allowances*; and
  - 5.3. Clause 15.1(a) sets five hours as the *outer limit* for a meal break to be taken by an employee; the five-hour period is not a threshold that must be reached for an entitlement to crystallise.
6. For the above reasons, clause 15.1(a) is entirely irrelevant for determining the threshold for overtime meal allowances, and any submissions based on or calculated using this clause are not useful in determining the issue currently in dispute.
7. The primary NFF submission is that an entitlement to a meal allowance or provided meal under the Pastoral Award does not necessarily equal an entitlement to a meal *break* at the same time. The AWU opposes this submission.
8. There is a strong implication on a plain reading of clause 17.2(c) that an employee would, after completing the required amount of overtime, be granted an opportunity to eat the meal that the employer has provided them, or purchase and consume a meal for which the allowance is payable.
9. To assert that a clause in the Pastoral Award provides an employee with a meal allowance or a meal free of charge for working overtime but does not also provide that same employee with an opportunity to eat that meal adds complexity to an otherwise simple entitlement. This assertion should be rejected.
10. The NFF submission also states that the phrase, "*commencing ordinary hours of work*" in clause 15.1(a) *must* have application beyond an employee commencing ordinary hours of work. The AWU opposes this submission.
11. It is our understanding that for the purposes of the NFF submission, the phrase, "*commencing ordinary hours of work*" in clause 15.1(a) is to apply to the commencement of *any period of work*, even if that period of work is continuous

with another period of work (i.e. the ordinary hours of work that an employee has completed before commencing overtime). The AWU submits that this is clearly not the case – one period of work cannot commence more than once.

12. The phrase, “*commencing ordinary hours of work*” is to be given its usual and ordinary meaning when interpreting clause 15.1(a). Such a reading precludes the NFF submission from being a reality.
13. The AWU also opposes the alternative NFF submission that the five-hour period in clause 15.1(a) should be used as a multiplier to determine overtime meal breaks. As stated in our submission, although using five hours as a multiplier may be convenient, it is nothing more than that.
14. The NFF uses a “standard” eight-hour day in order to make its point for its alternative position. The AWU notes that the Pastoral Award as a whole does not set an eight-hour day as a standard or ordinary, except in the case of shearers. The ordinary hours for other employees covered by the Pastoral Award are:
  - 14.1. For broadacre farming and livestock operations – ordinary hours are averaged over four weeks; no daily maximum;
  - 14.2. For pig breeding and raising – 12 hour daily maximum;
  - 14.3. For poultry farming – ordinary hours are averaged over four weeks; no daily maximum.
15. Applying the NFF alternative position to any period of ordinary daily hours except eight causes the alternative position to fall apart. For an award that does not utilise an eight-hour day as a standard, the NFF alternative position is untenable.
16. The NFF submission states that clauses 36.5 and 36.10 of the Pastoral Award apply in two distinct circumstances. The AWU agrees that the clauses are *supposed* to apply in such a manner, but based on how these two clauses are currently drafted, the AWU disagrees that the application of these clauses are currently distinct.

17. If clause 36.10 is to only apply in circumstances where clause 36.5 does not, clause 36.10 requires amendment to clarify this.
18. The AWU opposes the submission of the NFF to insert a provision into the Pastoral Award that denies the payment of an overtime meal allowance (or provision of a meal free of charge). This would be a substantive change and therefore requires a merit argument.
19. The AWU notes that we did not include the suggested amendment to clause 36.10 in our submission dated 6 March 2018 in error. Please see attached for a Draft Determination to remedy this. The Draft Determination also includes an updated amendment to clause 36.5 taking into account the NFF submission that clauses 36.5 and 36.10 are to apply in two distinct circumstances, and an amendment to clause 36.7.

Yours faithfully,

A handwritten signature in black ink, appearing to be 'ZD', with a long horizontal flourish extending to the right.

Zachary Duncalfe  
**NATIONAL LEGAL OFFICER**  
**The Australian Workers' Union**

# DRAFT DETERMINATION

*Fair Work Act 2009*

s.156 – 4 Yearly Review of Modern Awards

## 4 Yearly Review of Modern Awards

(AM2014/239)

### PASTORAL AWARD 2010

[MA000035]

Agricultural industry

JUSTICE ROSS, PRESIDENT

MELBOURNE, XX XX 2018

*4 yearly review of modern awards – Pastoral Award 2010 – ‘overtime meal allowances’*

A. Pursuant to section 156(2)(b)(i) of the Fair Work Act 2009, the *Pastoral Award 2010* is varied as follows:

[1] By deleting clause 36.5 and inserting the following:

**36.5** If an employee is required to work planned overtime after working ordinary hours on Monday to Friday, the employee will be paid a meal allowance of \$13.07 after every one and a half hours of overtime worked. The employer may supply the employee with a meal as an alternative to the payment of this allowance.

[2] By deleting the word ‘such’ appearing in clause 36.7.

[3] By deleting clause 36.10 and inserting the following:

**36.10** If an employee is required to work without having been notified before leaving work on the previous day (unplanned overtime), the employee will be paid an allowance of \$13.07 for every two hours of overtime worked. The employer may supply the employee with a meal as an alternative to the payment of this allowance.

B. This determination comes into operation from XX XX 2018. In accordance with s.165(3) of the *Fair Work Act 2009* this determination does not take effect until the start of the first full pay period that starts on or after XX XX 2018.

PRESIDENT